

STATEMENT OF SENATOR TIM JOHNSON
Hearing on the Confirmation of Ross O. Swimmer
February 12, 2003

Chairman Campbell, Vice Chairman Inouye, and members of the Committee, thank you for holding this hearing.

The tribes from my home state of South Dakota are deeply impacted and concerned about the present and future challenges faced by the Department of the Interior, Bureau of Indian Affairs and the Office of Special Trustee. By law, the federal government must protect the interests of tribes and its members as their trustee. The facts have demonstrated that the federal government has not lived up to its responsibilities to tribes. Understandably, many tribes are outraged by the fact that the trust fund accounting problems are not remedied. Perhaps born out of that frustration, many tribes are expressing their lack of faith in Mr. Swimmer's ability to turn the current situation around. Many of the tribal concerns are longstanding and I feel compelled to address them at this time.

The first concern stems from the fact that Mr. Swimmer seems to be caught in an inherent conflict. I understand that as Director of the Office of Indian Trust Transition, Mr. Swimmer was largely responsible for the "Fiduciary Obligations Compliance Plan" submitted last month by the Department of Interior in accordance with an order by Judge Lamberth. I am concerned by the appearance, if not the reality, of a conflict of interest created by Mr. Swimmer's past involvement with trust reform. In his current role, Mr. Swimmer finds himself largely defending the Department's actions in litigation. If he is confirmed, he must turn around and then serve as many of the Plaintiffs' Special Trustee. I hope to hear from Mr. Swimmer today regarding how he intends to reconcile this conflict.

My second concern regards whether Mr. Swimmer intends to utilize an appropriate trust standard. Pursuant to the 1994 Act, the Special Trustee is charged with the "duty" of monitoring "the reconciliation of tribal and individual Indian Money trust accounts to ensure that the Bureau provides the account holders with a fair and accurate accounting of all trust accounts." If the Department assumes that tribal "accounting" claims must go through an administrative review, this could mean, that Mr. Swimmer will be in charge of determining that the accountings provided are "fair and accurate." This would be the responsibility of the same individual that has advocated for the privatization of trust management outside the government without the government first providing an accounting. Once again, Mr. Swimmer appears to be in a conflicted position.

My final concern regards consultation. I am hopeful that Mr. Swimmer and the Department have learned the lesson of BITAM. Consultation is of paramount importance to tribes. Tribes want to be consulted *before* the government takes an action. Without consultation, it simply is impossible to know whether the trust reform program appropriately serves the tribal interests.

I look forward to hearing from Mr. Swimmer and the witnesses today. I hope today's hearing will help continue the dialogue between the Department and tribes relative to these important issues.

